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Dataway, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

AT&T Corp.

PLAINTIFF,

v.

Dataway, Inc.

DEFENDANT.

CASE NO. C07-02440 EDL

**(SECOND AMENDED)
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION TO COMPEL
RESPONSE TO DEFENDANT'S
REQUEST FOR PRODUCTION OF
DOCUMENTS**

Date: May 20, 2008

Time: 9:00 a.m.

Courtroom: E

Dataway, Inc.

COUNTERCLAIMANT

v.

AT&T Corp.

COUNTERDEFENDANT

1 Defendant/Counterplaintiff Dataway, Inc. (hereinafter "Dataway"), hereby submits its
 2 Memorandum of Points and Authorities in Support of its Motion to Compel a response to
 3 Dataway's Request for Production served upon Plaintiff on January 17, 2008, in accordance
 4 with the Federal Rules of Civil Procedure and the Northern District Local Rules.

5 This began as a collection action in which Plaintiff AT&T alleges that Dataway
 6 incurred certain expenses for telephone calls made using AT&T services, and alleges further
 7 that Dataway has failed and refused to pay for said expenses. Dataway asserts that the expenses
 8 alleged were the result of the unauthorized, intervening, criminal conduct of third-party
 9 hackers from a remote location, and not made using the services contracted for by Dataway,
 10 but charged to an account neither opened, maintained, nor authorized by Dataway. Dataway
 11 has counterclaimed against Plaintiff alleging various contract breaches, fraud and violation of
 12 the "anti-slamming" law, 47 U.S.C. §258. Despite its seemingly simplistic nature, it is
 13 respectfully submitted that this case presents novel issues the resolution of which will establish
 14 new precedent on the horizon of the legal landscape created by the rapidly changing
 15 technology of our world.

16 Plaintiff asserts that four of the five counts of Dataway's Counterclaim are barred by
 17 the "Filed Tariff Doctrine"; Dataway relies in large part on the case of AT&T v. Ting, 319 F.3d
 18 1126 (9th Cir. 2003), to support its contention that FCC intended that state law remedies in the
 19 newly-detariffed telecommunications marketplace is an essential part of protection for
 20 consumers, including small businesses, especially in countering abuses by large
 21 telecommunications companies.

22 On or about January 17, 2008, Dataway served a Request for Production of Documents
 23 upon Plaintiff pursuant to FRCP 34. While an argument might be made that some of the 15
 24 requests are broader than others, it is respectfully submitted that the requests were made in
 25 compliance with the requirements of the Rule, that is: they describe with reasonable
 26 particularity each item or category of items to be inspected; they specify a reasonable time,
 27

place, and manner for the inspection and for performing the related acts; they specify the form or forms in which electronically stored information is to be produced.

Plaintiff's "response" to the Request for Production was received by email on the day after same was due. (See Declaration of Anne-Leith Matlock, Esq.; attached). As can be seen from even a cursory review of the Plaintiff's "response" to the Request for Production, Plaintiff's answer to each and every request, all fifteen of them, is identical. Consequently, and in the interests of conserving judicial and natural resources, after setting forth in full Plaintiff's initial response, Defendant has referred back to the first response for each subsequent response:

REQUEST FOR PRODUCTION NO. 1

All documents, electronic data, and electronic data, and electronic media concerning the Defendant including, but not limited to, any and all contracts, bills or interoffice correspondence, for any and all accounts during the relevant period.

RESPONSE TO PRODUCTION NO. 1

Objection. Responding Party objects on the grounds that this discovery request seeks information that constitutes confidential attorney-client communication. Responding Party further objects on the grounds that this discovery request seeks information which is irrelevant to the subject matter of this action and which does not appear reasonably calculated to lead to the discovery of admissible evidence. Responding Party further objects on the grounds that his discovery request seeks information which is protected attorney work product. Responding Party further objects on the grounds that this discovery request is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, and the importance of the issues at stake in the litigation. Responding Party further objects on the grounds that this discovery request is unreasonably cumulative or duplicative, or the information sought is obtainable from some other source that is more convenient, less burdensome, or less expensive. Responding Party further objects on the grounds that this discovery request seeks information relating to protected confidential, proprietary or trade

secret matter. Responding Party further objects on the grounds that this discovery request is overbroad, vague, ambiguous and unintelligible as to time and place.

LOCAL RULE 37-2 STATEMENT

The documents requested are relevant to Defendant's defense of the collection action as well as to Defendant's Counterclaim for breach of express contract, breach of oral contract, fraudulent inducement to contract, slamming, and tortious interference with contractual relations; the request is reasonably calculated to lead to the discovery of admissible evidence; the documents requested are not unreasonably cumulative or duplicative, and, inasmuch as they are documents generated and/or received by the Plaintiff with respect to this very Defendant, cannot be obtained from some other source that is more convenient, less burdensome or less expensive. Plaintiff has not identified by name, category or description any document in the Plaintiff's possession that is subject to non-production because of privilege, or for any other reason as provided in Federal Rules of Civil Procedure, nor has Plaintiff specified its objection to any part of an item or category and allowed production as to the rest.

REQUEST FOR PRODUCTION NO. 2

All communications between you and the Defendant during the relevant period.

RESPONSE TO PRODUCTION REQUEST NO. 2

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 3

All communication between you and any person or entity concerning the Defendant during the relevant period.

RESPONSE TO PRODUCTION REQUEST NO. 3

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 4

All documents, electronic data, and electronic media concerning Defendant's complaint to you regarding bills received by Defendant.

RESPONSE TO PRODUCTION REQUEST NO. 4

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 5

All communications between you and the Defendant concerning the fraud complaint filed with you by Defendant.

RESPONSE TO PRODUCTION REQUEST NO. 5

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 6

All communications between you and any person or entity concerning the fraud complaint filed with you by defendant.

RESPONSE TO PRODUCTION REQUEST NO. 6

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 7

All documents, electronic data, and electronic media reflecting, establishing or concerning the relationship between Aires Law Firm and the Bethune & Associates as it relates to Defendant and the AT & T accounts assigned to Defendant.

RESPONSE TO PRODUCTION REQUEST NO. 7

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 8

All communications between and among the Aires Law Firm and any person employed by or associated with Bethune & Associates as it relates to Defendant.

RESPONSE TO PRODUCTION REQUEST NO. 8

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 9

All documents, electronic data, and electronic media concerning the investigation of Defendant's fraud complaint with the F.C.C., C.P.U.C and/or any division or office of Plaintiff.

RESPONSE TO PRODUCTION REQUEST NO. 9

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 10

All communications between and among Plaintiff and any person or entity, including governmental entities referred to above, concerning the fraud complaint filed by Defendant.

RESPONSE TO PRODUCTION REQUEST NO. 10

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO.11

All documents, electronic data, and electronic media containing, reflecting or concerning AT & T's policies, procedures and protocol for resolving fraud complaints filed by AT & T customers.

RESPONSE TO PRODUCTION REQUEST NO. 11

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 12

All recordings of telephonic communication between you and the Defendant, its agents and employees during the relevant period concerning its account, its fraud complaint, or any other matter relevant to this litigation.

RESPONSE TO PRODUCTION REQUEST NO. 12

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 13

ALL DOCUMENTS, ELECTRONIC DATA, and ELECTRONIC DATA, and ELECTRONIC MEDIA, notes, memoranda, correspondence, e-mails and other documents regarding Defendant or the instant litigation, including, without limitation, documents generated during the course of any conversation or meeting.

RESPONSE TO PRODUCTION REQUEST NO. 13

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 14

All DOCUMENTS, ELECTRONIC DATA, and ELECTRONIC MEDIA of any nature or kind relating to Plaintiff's cause of action or any defense asserted or alleged by Defendant.

RESPONSE TO PRODUCTION REQUEST NO. 14

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

REQUEST FOR PRODUCTION NO. 15

All DOCUMENTS, ELECTRONIC DATA, and ELECTRONIC MEDIA to be used for trial for impeachment or other purposes.

RESPONSE TO PRODUCTION REQUEST NO. 15

See Plaintiff's Response to Production Request No. 1.

LOCAL RULE 37-2 STATEMENT

See Local Rule 37-2 Statement set forth in full above.

Not a single document or piece of information of any kind was produced, nor was any specific objection made to any item requested. A call placed to Plaintiff's attorney's office in an effort to meet and confer to obtain the requested documents was countered not with a good faith effort to resolve the discovery dispute, but with an email staunchly defending the initial evasive response. A second and third call to Plaintiff's attorney went unanswered. (See Declaration of Anne-Leith Matlock; attached).

It is respectfully submitted that this is simply not a good faith attempt at responding to a Request for Production, and is so lacking in substance and meaning as to constitute a non-

1 response. Rule 34 provides that for each item or category requested, the response must either
 2 state that inspection and related activities will be permitted as requested or state an objection to
 3 the request, including the reasons. If an objection is made, the objection to part of a request
 4 must specify the part and permit inspection of the rest. This was clearly not done. F.R.C.P. 37
 5 (a)(4) states that for purposes of a motion to compel, an evasive or incomplete disclosure,
 6 answer, or response must be treated as a failure to disclose, answer, or respond.

7 F.R.C.P. 37 provides further that where a party fails to respond as required under R 34,
 8 a motion to compel and for sanctions may be brought. Moreover, F.R.C.P. 37(a) (2) clearly
 9 states that a failure described in Rule 37(d)(1)(A) is not excused on the ground that the
 10 discovery sought was objectionable, unless the party failing to act has a pending motion for a
 11 protective order under Rule 26(c). Upon reasonable investigation, Dataway has not discovered
 12 any such motion for protective order pending. Dataway therefore respectfully requests an
 13 Order compelling Plaintiff to respond, and imposing sanctions upon Plaintiff for its intentional
 14 failure to conduct discovery in good faith.

15 Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

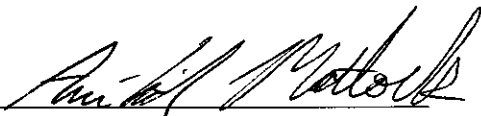
- 16 (i) directing that the matters embraced in the order or other designated facts be
- 17 taken as established for purposes of the action, as the prevailing party claims;
- 18 (ii) prohibiting the disobedient party from supporting or opposing designated claims
- 19 or defenses, or from introducing designated matters in evidence;
- 20 (iii) Striking pleadings in whole or in part;
- 21 (iv) staying further proceedings until the order is obeyed;
- 22 (v) dismissing the action or proceeding in whole or in part;
- 23 (vi) rendering a default judgment against the disobedient party; or
- 24 (vii) treating as contempt of court the failure to obey any order except an order to
- 25 submit to a physical or mental examination
- 26
- 27
- 28

1 Instead of or in addition to these sanctions, the court must require the party failing to act, the
2 attorney advising that party, or both to pay the reasonable expenses, including attorney's fees,
3 caused by the failure, unless the failure was substantially justified or other circumstances make
4 an award of expenses unjust. F.R.C.P. 37(5)(A). It is respectfully submitted that an award of
5 this kind under these circumstances is completely just, and in fact, is precisely the sort of
6 situation contemplated by Rule 37.

7
8 In light of the foregoing, Defendant/Counterclaimant Dataway, Inc., respectfully
9 requests that an Order be entered compelling Plaintiff to fully and completely respond to
10 Dataway's Request for Production, and for sanctions including attorney's fees and costs.

11
12 Dated: April 22, 2008

MATLOCK LAW GROUP

13
14 By: 

15 Anne-Leith Matlock, Esq.
16 Attorneys for Defendant/
17 Counterclaimant Dataway, Inc.